

**SANITIZED DECS. – 02-662 P, 02-663 P & 02-664 P – BY – GEORGE V. PIPER –  
ISSUED – 06/06/03 – SUBMITTED FOR DECISION – 04/23/03**

**SYNOPSIS**

**PERSONAL INCOME TAX – NON-RESIDENCY NOT PROVEN** – The fact that at least one of the Petitioners holds a West Virginia drivers license which has never been surrendered, has motor vehicles registered in the State of West Virginia, and has a telephone listing in his own name in this State, is clear and convincing evidence that Petitioner(s) are not non-residents of the State of West Virginia.

**CORRECTED FINAL DECISION**

The State Tax Commissioner's Internal Auditing Division issued a West Virginia personal income tax assessment against the Petitioners. This assessment was for the year 1995, for tax, interest, through November 8, 2002 and additions to tax.

Written notice of this assessment was served on the Petitioners.

Also, the Commissioner issued a personal income tax assessment against the Petitioners, under the provisions of Chapter 11, Articles 10 and 21 of the West Virginia Code, for the year 1998, for tax, interest, through November 8, 2002, and additions to tax.

Written notice of this assessment was served on the Petitioners.

Also, the Commissioner issued a personal income tax assessment against the Petitioners, under the provisions of Chapter 11, Articles 10 and 21 of the West Virginia code, for the year 1999, for tax, interest, through November 8, 2002, and additions to tax.

Written notice of this assessment was served on the Petitioners.

Thereafter, by mail postmarked, November 18, 2002, the Petitioners timely filed with this tribunal, the West Virginia Office of Tax Appeals, petitions for reassessment.

### **FINDINGS OF FACT**

1. Petitioners alleged at hearing to be full-time out-of-state residents prior to tax year 1995.

2. Petitioners are registered to vote out-of-state and both have out-of-state drivers' license.

3. Subsequent investigation by this Tribunal revealed that one Petitioner also has a West Virginia driver's license which does not expire until 2004, at least two (2) vehicles titled in this State, and also a West Virginia telephone listing in his own name.

### **DISCUSSION**

The core issue is whether Petitioners as alleged out-of-state residents have shown that dividends and other corporate emoluments received from a West Virginia c-corporation are exempt from West Virginia personal income tax because they are both non-residents.

The answer in this case is no. Because at least one of the Petitioners holds a West Virginia drivers license, has two (2) West Virginia titled motor vehicles, and has a telephone listing here in his own name, his argument falls on deaf ears that he is clearly not a West Virginia resident. What is clear, however, is that at least one of the Petitioners has concocted a plan to appear to be a West Virginia non-resident while at the same time enjoying some of the benefits that West Virginia residents enjoy, i. e. driver's license, car registration (personal property ownership), and the like.

Accordingly, it is **DETERMINED** that Petitioners have not shown that they are non-residents.

It should be noted that because Petitioners have not proven non-residency, there is no need for this Tribunal to address Petitioner's argument that the income in question is not subject to tax under W. Va. Code § 11-21-32.

The issue presented in this matter involve the following important rules of administrative agency authority and statutory construction. Initially, it is important at all times to recognize and to give more than just "lip service" to two general points: (1) rather than utilizing a so-called "de novo" scope of review, deference is to be given to the expertise of the administrative agency, even with respect to an "issue of law," when that issue of law is one within the peculiar expertise of the administrative agency; and (2) any applicable legislative regulation does not merely reflect the administrative agency's position but, instead, has been legislatively reviewed and approved, has exactly the same force and effect as a statute, and is, therefore, subject to the usual, deferential rules of statutory construction, see Feathers v. West Virginia Board of Medicine, 211 W. Va. 96, 102, 562 S.E.2d 488, 494 (2002).

The following specific points flow from these general points. "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the reviewing [tribunal] is whether the agency's answer is based on a permissible construction of the statute." Syllabus point 4, in relevant part, Appalachian Power Co. v. State Tax Department, 195 W. Va. 573, 466 S.E.2d 424 (1995) (emphasis added). Similarly, "the Tax Commissioner [or the West Virginia Office of Tax Appeals] need not write a rule [or an administrative decision] that serves the statute in the best or most logical

manner; he [, or she, or the Office of Tax Appeals] need only write a rule [or a decision] that flows rationally from the statute.” Id., 195 W. Va. at 588, 466 S.E.2d at \_\_\_\_ (emphasis added). Thus, “[i]nterpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous.” Syllabus point 3, Shawnee Bank, Inc. v. Paige, 200 W. Va. 20, 488 S.E.2d 20 (1997) (internal citation omitted) (emphasis added). Finally, “courts will not override administrative agency decisions, of whatever kind, unless the decisions contradict some explicit constitutional provision or right, are the results of a flawed process, or are either fundamentally unfair or arbitrary.” Appalachian Power, 195 W. Va. at 589, 466 S.E.2d at \_\_\_\_ (quoting Frymier-Halloran v. Paige, 193 W. Va. 687, 694, 458 S.E.2d 780, 787 (1995)).

### **CONCLUSION(S) OF LAW**

Based upon all of the above it is **DETERMINED** that:

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the petitioner-taxpayer, to show that the assessment is incorrect and contrary to law, in whole or in part. See W. Va. Code § 11-10A-10(e).
2. The Petitioners-taxpayers in this matter have failed to carry the burden of proof with respect to the non-residency issue.

### **DISPOSITION**

**WHEREFORE**, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the personal income tax assessment issued against the Petitioners for the year 1995, for tax, interest, updated through May 15, 2003, and additions to tax, should be and is hereby **AFFIRMED**.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the personal income tax assessment issued against the Petitioners for the year 1998, for tax, interest, updated through May 15, 2003, and additions to tax, should be and is hereby **AFFIRMED**.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the personal income tax assessment issued against the Petitioners for the year 1999, for tax, interest, updated through May 15, 2003, and additions to tax, should be and is hereby **AFFIRMED**.